

111TH CONGRESS }    HOUSE OF REPRESENTATIVES    { REPORT  
    *1st Session*    111-139

## WEBCASTER SETTLEMENT ACT OF 2009

JUNE 8, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary,  
submitted the following

## REPORT

[To accompany H.R. 2344]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2344) to amend section 114 of title 17, United States Code, to provide for agreements for the reproduction and performance of sound recordings by webcasters, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

## CONTENTS

	Page
Purpose and Summary .....	1
Background and Need for the Legislation .....	2
Hearings .....	3
Committee Consideration .....	4
Committee Votes .....	4
Committee Oversight Findings .....	4
New Budget Authority and Tax Expenditures .....	4
Congressional Budget Office Cost Estimate .....	4
Performance Goals and Objectives .....	5
Constitutional Authority Statement .....	5
Advisory on Earmarks .....	5
Section-by-Section Analysis .....	5
Changes in Existing Law Made by the Bill, as Reported .....	5

## PURPOSE AND SUMMARY

H.R. 2344 would amend section 114 of title 17, United States Code, to allow the recording industry to negotiate and enter into alternative royalty fee agreements with webcasters within thirty

days of its enactment. Any agreement reached would replace the rates established under the Copyright Royalty Board's 2007 decision.

## BACKGROUND AND NEED FOR THE LEGISLATION

### BACKGROUND

In 1998, in the Digital Millennium Copyright Act ("DMCA"),<sup>1</sup> Congress amended several statutory licensing statutes to provide for and clarify the treatment of different types of Internet broadcasting, or webcasting. As a result, two categories of webcasting qualify for a compulsory license—"preexisting" subscription services existing at the time of the DMCA's enactment and "an eligible nonsubscription transmission."<sup>2</sup> A subscription service is one that is limited to paying customers. The broader category of webcasters who may qualify for the statutory license under 17 U.S.C. §114(d) are those who transmit music over the Internet on a nonsubscription, noninteractive basis.

The initial ratemaking proceeding for statutory royalty rates for webcasters for the period 1998 through 2005 proved to be controversial. The Librarian of Congress, under the guidance of the U.S. Copyright Office, rejected the recommendation issued by the Copyright Arbitration Royalty Panel ("CARP") and revised rates downward. Congress intervened as well with enactment of the Small Webcasters Settlement Act of 2002 ("SWSA"), Pub. L. No. 107-321, which permitted more options than the royalty rates established by the Librarian's order.

Subsequent to passage of the SWSA and the initial ratemaking proceeding, Congress substantially revised the underlying adjudicative process. Enactment of the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, abolished the CARP system and substituted a Copyright Royalty Board ("CRB") composed of three judges. As required by law, in March 2007, the CRB announced royalty rates for the period from January 1, 2006, through December 31, 2010.

### COPYRIGHT ROYALTY BOARD RATES

The final determination of the CRB establishes new rates for commercial and noncommercial webcasters who qualify for the §114 compulsory license under the "willing buyer/willing seller" standard.<sup>3</sup> The CRB considered the proposals by representatives of smaller webcasters that rates be structured as a percentage of revenue, but ultimately rejected them in lieu of a minimum-payment-per-song-per-listener formula.

The new rates were not well received in the small webcasting business community. Some Members of Congress voiced concern as well. Several parties filed suit to appeal the CRB decision. Upon consolidation of the appeals, oral argument was heard on March 19, 2009. A decision is likely to be issued by summer 2009.

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<sup>1</sup> Pub. L. No. 105-304 (October 28, 1995).

<sup>2</sup> Under the DMCA, while satellite radio and Internet radio providers pay performance royalties in addition to publishing royalties, traditional radio broadcasters pay only publishing royalties.

<sup>3</sup> 17 U.S.C. §114(f)(2)(B).

Parallel to the judicial proceedings, private negotiations are ongoing between SoundExchange, the organization charged with collecting and distributing performance royalties, and both large and small webcasters, in an attempt to reach a compromise royalty rate agreement that would serve as an alternative to the payment scheme provided by the CRB decision.

#### THE WEBCASTER SETTLEMENT ACT OF 2008

H.R. 7084, the Webcaster Settlement Act of 2008 (“2008 WSA”), which became law in October 2008, provided limited statutory authority for SoundExchange to negotiate and enter into alternative royalty fee agreements with webcasters that would replace the rates established under the CRB’s decision.

Three negotiated royalty agreements have been made under the authority of the 2008 WSA. The Corporation for Public Broadcasting and SoundExchange announced on January 15, 2009, that they had reached consensus on the royalty rates to be paid for by approximately 450 public radio webcastings, including NPR and Public Radio International.<sup>4</sup> On February 15, 2009, the National Association of Broadcasters (“NAB”) and SoundExchange informed the Copyright Office that they had made an agreement that covers an extended royalty period for terrestrial AM or FM radio broadcasters who simulcast their signal or stream other programming over the Internet.<sup>5</sup> On February 15, 2009, a limited number of small webcasters reached an agreement with SoundExchange for the same royalty period as the NAB’s license.

Other small and large webcasters were not able to successfully negotiate a new rate agreement with the recording industry within the time allotted by the 2008 WSA.

On January 5, 2009, the CRB announced that it would soon begin the third proceeding to determine royalty rates for the statutory license covering Internet transmissions of sound recordings, applicable to the next royalty period that runs from January 1, 2011, through December 31, 2015.<sup>6</sup>

#### THE WEBCASTER SETTLEMENT ACT OF 2009

H.R. 2344, the Webcaster Settlement Act of 2009, would allow those small and large webcasters who have yet to reach an agreement with SoundExchange another opportunity to do so. It permits them to negotiate alternative rates within thirty days of its enactment.

#### HEARINGS

The Committee held no hearings on H.R. 2344.

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<sup>4</sup> Corporation for Public Broadcasting, Agreement Reached for Public Radio’s Webcasting Royalty Rates, available at <http://www.cpb.org/pressroom/release.php?prn=699>.

<sup>5</sup> U.S. Copyright Office, Library of Congress, Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293, 9299 (Mar. 3, 2009).

<sup>6</sup> Copyright Royalty Board, Library of Congress, Digital Performance in Sound Recordings and Ephemeral Recordings, 74 Fed. Reg. 318 (Jan. 5, 2009).

#### COMMITTEE CONSIDERATION

On May 13, 2009, the Committee met in open session and ordered the bill H.R. 2344 favorably reported without amendment, by voice vote, a quorum being present.

#### COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2344.

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2344, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 18, 2009.*

*Hon. JOHN CONYERS, Jr., Chairman,  
Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2344, the Webcaster Settlement Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226-2860.

Sincerely,

*DOUGLAS W. ELMENDORF,  
Director.*

Enclosure

cc: Honorable Lamar S. Smith.  
Ranking Member

*H.R. 2344—Webcaster Settlement Act of 2009.*

H.R. 2344 would allow entities that broadcast audio content over the Internet (Webcasters) to continue to negotiate royalty rates with SoundExchange, the entity designated to collect royalties for the music industry. Under provisions of the Webcaster Settlement Act of 2008 (Public Law 110–435), SoundExchange was given limited authority to enter into royalty fee agreements with Webcasters that would differ from the rates established by the Copyright Royalty Board. This limited authority expired on February 15, 2009; H.R. 2344 would extend the authority for 30 days after the date of enactment of the bill.

Because royalties collected and paid out by SoundExchange do not flow through the federal budget, CBO estimates that implementing H.R. 2344 would have no effect on federal receipts or spending.

H.R. 2344 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2344 would permit the recording industry and webcasters to negotiate alternative royalty rates within thirty days of its enactment.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

#### ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2344 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

#### SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short title.* Section 1 sets forth the short title of the bill as the “Webcaster Settlement Act of 2009.”

*Sec. 2. Authorization of Agreements.* Section 2 allows for the implementation of any agreement(s) reached between SoundExchange and webcasters by 11:59 p.m. on the thirtieth day after the bill’s enactment.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

## **SECTION 114 OF TITLE 17, UNITED STATES CODE**

### **§ 114. Scope of exclusive rights in sound recordings**

(a) \* \* \*

\* \* \* \* \* \* \* \*  
 (f) LICENSES FOR CERTAIN NONEXEMPT TRANSMISSIONS.—  
 (1) \* \* \*

\* \* \* \* \* \* \* \*  
 (5)(A) \* \* \*  
 \* \* \* \* \* \* \* \*

(D) Nothing in the Webcaster Settlement Act of [2008] 2008, the Webcaster Settlement Act of 2009, or any agreement entered into pursuant to subparagraph (A) shall be taken into account by the United States Court of Appeals for the District of Columbia Circuit in its review of the determination by the Copyright Royalty Judges of May 1, 2007, of rates and terms for the digital performance of sound recordings and ephemeral recordings, pursuant to sections 112 and 114.

(E) As used in this paragraph—  
 (i) \* \* \*

\* \* \* \* \* \* \* \*  
 (iii) the term “webcaster” means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefor [to make eligible nonsubscription transmissions and ephemeral recordings].

(F) The authority to make settlements pursuant to subparagraph (A) shall expire [February 15, 2009] at 11:59 p.m. Eastern time on the 30th day after the date of the enactment of the Webcaster Settlement Act of 2009.

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